THEIN THAM SANG

v.

THE UNITED STATES ARMY MEDICAL RESEARCH UNIT & ANOR.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
GEORGE SEAH FJ
MOHD. AZMI FJ
[CIVIL APPEAL NO. 80 OF 1982]
30 MARCH 1983

LABOUR LAW: *Employee's service summarily terminated - Employee died before reference was heard by Industrial Court - Employee's widower/personal representative applied that he be substituted in place of the deceased - Proceedings struck off - Whether proceedings had abated upon death of the employee.*

ADMINISTRATIVE LAW: *Mandamus - Application by widower/legal representative and administrator to the High Court to issue to the Industrial Court - Application dismissed - Appeal to the Federal Court against the dismissal.*

This was an appeal against the judgment of Hashim Yeop A. Sani J reported in [1982] CLJ (Rep) 820 refusing to make an order of *mandamus* as prayed by the appellant in his capacity as legal representative and administrator directed at the President of the Industrial Court.

The brief facts in so far as they are relevant to this appeal were that one Mrs. Elizabeth Thein nee Lee Geak Choo (now deceased) was employed by the respondent No. 1 as a supply supervisor. On 14 February 1980 respondent No. 1 summarily terminated her service which she considered her dismissal as without just cause or excuse and made representations in writing within the prescribed time to the Director General of the Industrial Relations for reinstatement in her former employment. Since there was no settlement, the Minister of Labour and Manpower, in the exercise of his discretion, referred the complaint to the Industrial Court for an award under s. 20(3) of the Industrial Relations Act 1967 (as amended). However before the reference could be heard, Mrs. Elizabeth Thein died intestate on 7 January 1981. Her widower/personal representative, the appellant attempted to continue the proceedings in the Industrial Court and applied that he be substituted in place of the deceased. Counsel for the employer who opposed this argued, *inter alia*, that the proceedings in the Industrial Court had abated upon the death of Mrs. Elizabeth Thein and the President of the Industrial Court accordingly struck off the proceedings.

Held:

[1] There is no provision in the Industrial Relations Act 1967 or in the Industrial Court Rules, 1967 to allow the legal representative or administrator of the estate of the deceased workman to appear at the Industrial Court proceedings under s. 20(3) of the Act.

[2] Having regard to the abovementioned facts, the Federal Court agreed with the learned Judge that proceedings under s. 20(3) of the Act are a claim personal to the non-union workman and that it abated on his death. In short, the maxim *actio personalis moritur cum persona* applies to the facts of this case.

[Appeal dismissed with costs.]

Case referred to:
Assunta Hospital v. Dr. A. Dutt [1981] 1 MLJ 115

Legislation referred to:
Employment Protection (Consolidation) Act 1978 [UK], rr. 2, 3(a), 10 of Schedule 12
Industrial Relations Act 1967, ss. 2, 20, (3), 27(1)(c), (d), 29(a)

For the appellant - C. T. Khaw; M/s. Allen & Gledhill
For the respondent - C. V. Das; M/s. Shook Lin & Bok

JUDGMENT

George Seah FJ:

This is an appeal against a judgment of the learned Judge refusing to make an order of *mandamus* directed at the President of the Industrial Court. The brief facts insofar as they are relevant to this appeal are these:

One Mrs. Elizabeth Thein nee Lee Geak Choo (now deceased) was employed by the United States Army Medical Research Unit (hereinafter referred to as the Employer) as a Supply Supervisor. On 14 February 1980 the Employer summarily terminated her service. She considered that she had been dismissed without just cause or excuse and made representations in writing within the prescribed time to the Director-General of the Industrial Relations to be reinstated in her former employment. Since there was no settlement the Minister of Labour and Manpower was duly notified and the Minister, in the exercise of his discretion, referred the complaint to the Industrial Court for an award under s. 20(3) of the Industrial Relations Act 1967 (as amended) (hereinafter referred to as the Act).

Before the reference could be heard Mrs. Elizabeth Thein died intestate on 7 January 1981. Her widower and personal representative, Thein Tham Sang, attempted to continue the proceeding in the Industrial Court and applied that he be substituted in place of the deceased. This was opposed by Counsel for the Employer who argued, *inter alia*, that the proceeding in the Industrial Court had abated upon the death of Mrs. Elizabeth Thein. The President of the Industrial Court agreed with his submission and struck out the proceeding.

In the High Court, Thein Tham Sang appeared in his capacity as legal representative and administrator of the estate of Mrs. Elizabeth Thein nee Lee Geak Choo (deceased) and prayed for an order of *mandamus*. Counsel for the Employer repeated the same submission before the learned Judge and again it was upheld. The application was dismissed with costs.

Thein Tham Sang was dissatisfied with this decision and had appealed to this Court. Henceforth, Thein Tham Sang will be referred to as the appellant and the Employer as the respondent.

Reference has been made to the Employment Protection (Consolidation) Act 1978 of the United Kingdom. Under this Act there are express provisions dealing with such an event like the death of a workman when his case is pending in the industrial tribunal. Rule 2 of Schedule 12 provides that "where an employee or employer has died, tribunal proceedings under any of the relevant provisions may be instituted or continued by a personal representative of the deceased employee or, as the case may be, defended by a personal representative of the deceased employer". In such a case any award made by the industrial tribunal shall be in such terms and shall be enforceable in such manner as may be provided by regulations made by the Secretary of State (r. 3(a)). And r. 10 reads:

> Where an employee has died, then, unless an order for reinstatement or re-engagement has already been made, s. 69 shall not apply; and accordingly if the industrial tribunal finds that the grounds of the compliant are well-founded the case shall be treated as falling within s. 68(2) as a case which no order is made under s. 69.

No such provisions are contained in the Industrial Relations Act 1967 (as amended) or in the Industrial Court Rules 1967 (PU. 406).

Now, s. 20 of the Act reads:

> 20(1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within thirty days of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
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> (2) Upon receipt of the representations the Director-General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director-General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director-General under subsection (2), the Minister may if he thinks fit, refer the representations to the Court for an award.
>
> (4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any Court in respect of wrongful dismissal.
>
> (5) ... not relevant to this appeal.

It was submitted by learned Counsel for the appellant that notwithstanding the death of Mrs. Elizabeth Thein the reference under s. 20(3) of the Act must be adjudicated upon by the Industrial Court after the appellant has been substituted as a party in place of the deceased under s. 29 (a). Apparently, learned Counsel was relying on a passage in the judgment of Chang Min Tat, FJ in the Federal Court case of *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115 at p. 116 where the learned Judge said:

> ... Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seised with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may result in an order for *mandamus* ...

For the respondent, it was argued by learned Counsel that the provision of s. 29(a) does not apply in that the Industrial Court has no power to order a legal representative or administrator of the estate of the deceased workman to be substituted. It was contended further that the power under sub-paragraph (a) should be given a restricted construction.

In our judgment, the *Assunta Hospital* case (*supra*) can be distinguished from the facts of the present case in that the workman Dr. Dutt was still living when the appeal was heard. Whereas here the workman Mrs. Elizabeth Thein was already dead. In our judgment, the observation of the learned Judge should be confined within the context of that case.

"Party" with reference to a trade dispute, means a trade union or workmen acting for all or any number of its members in the trade dispute; or an employer acting for himself in the trade dispute, or a trade union of employers acting for all or any number of its members in the trade dispute (see s. 2). Having further regard to the definitions of "trade dispute" and "workman" in s. 2 thereof, we are of the view that the word "party" in s. 29(a) of the Act does not include the legal representative or administrator of the estate of the deceased workman.

Support for this narrow interpretation may be found in the provision of s. 27(1)(c) and (d) of the Act which read as follows:

27(1) A party to a trade dispute, or to a reference to the Court under s. 20(3), may at proceedings before the Court -

(a) ...

(b) ...

(c) where the party is a workman (in proceedings under s. 20(3), appear himself personally;

(d) where the party is a trade union, or an employer, or a workman (in proceedings under s. 20(3)), be represented with the permission of the President or the Chairman, by an advocate ...

If the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under s. 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967.

Having regard to the abovementioned facts, we agree with the learned Judge that proceedings under s. 20(3) of the Act are a claim personal to the non-union workman and that it abated on his death. In short, the maxim *actio personalis moritur cum persona* applies to the facts of this case. In the result, we dismiss the appeal with costs.

Also found at [1983] 1 CLJ 240